which the Company and its counsel considered to be incorrect and unjustified under the Massachusetts statute providing for such tax.

This objective to be achieved by changing the corporate domicile of Newmarket Mfg. Co. was perfectly legitimate—the district court correctly described it as a "bona fide" corporate purpose; and of course it was not in any sense a maneuver to avoid or evade federal taxes.

During the brief period from the date of its organization on September 26, 1951, until the effective date of the merger, November 30, 1951, the subsidiary Delaware corporation carried on no business, had no liabilities, and its sole asset was the $1,000 cash paid in by the Massachusetts corporation as above stated. The tax return of the Delaware corporation for that brief period showed no income and no tax due.

At the close of business on November 30, 1951, the Massachusetts corporation merged with its wholly-owned Delaware subsidiary, in a statutory merger pursuant to the corporation laws of the two states. All the assets of the surviving Delaware corporation came from the Massachusetts corporation; the Agreement of Merger provided that, without other transfer, the surviving Delaware corporation should succeed to all the rights, assets, franchises, etc., of the two constituent corporations, that is, of the Massachusetts corporation and of its wholly-owned Delaware subsidiary; and it also stated that "all debts, liabilities and duties of the respective Constituent Corporations shall thenceforth attach to the Surviving Corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it." The latter provision is said to be, and probably is, a prerequisite to an effective statutory merger under the corporation laws of both

states. To avoid the nuisance and expense involved in the surrender of the certificates of stock of the Massachusetts corporation and the issuance in substitution therefor of new certificates of the surviving corporation, the Agreement of Merger provided that each outstanding certificate of stock of the Massachusetts corporation "shall be deemed for all corporate purposes, including the payment of dividends," to evidence the ownership of corresponding shares of the capital stock of the surviving Delaware corporation. Finally, the Agreement of Merger provided that the organization of the Massachusetts corporation, "except in so far as it may be continued by statute, shall cease as soon as" such merger should become effective, "and thereupon Newmarket Delaware and Newmarket Mass. shall become a single corporation, to wit, Newmarket Delaware, one of the parties hereto." As stated by the district court: "After the merger, the Massachusetts corporation ceased to exist as a separate corporation."

On and after the effective date of the merger, the surviving Delaware corporation had the following characteristics identical with those of the predecessor Massachusetts corporation: The par value of the shares of stock of the surviving corporation was the same as the par value of the shares of stock of the Massachusetts corporation; the number of shares of stock outstanding in the surviving corporation, and the ownership thereof, were exactly the same as the number and ownership of the shares of stock of the Massachusetts corporation; the officers of the surviving Delaware corporation were the same as those of the extinguished Massachusetts corporation; and the new corporation conducted the same business (and no other) in the same places and in the same manner as had the Massachusetts corporation immediately

prior to the merger. The corporate purposes stated in the charter of the surviving Delaware corporation were substantially equivalent to the corporate purposes which had been stated in the charter of the Massachusetts corporation.

The operations of the Massachusetts corporation for the full fiscal year ending with the date of the merger, November 30, 1951, resulted in a federal income tax liability of over $400,000, according to the tax return for this period, which was filed by the surviving Delaware corporation. The latter, during the year 1952, paid the income tax shown to be due thereon.

Subsequent to the merger, during the first full fiscal year of the surviving Delaware corporation, ending November 30, 1952, that corporation, in conducting the business of weaving synthetic fibers previously engaged in by the Massachusetts corporation, suffered a net operating loss of $660,370.97 which was available for possible carry-back or carry-over. Operations for several subsequent years also resulted in net losses. On March 6, 1953, this Delaware corporation filed with the Director of Internal Revenue at Boston, Mass., a claim for refund of income taxes theretofore paid by it for the fiscal year ending November 30, 1951, on the return filed by it on behalf of the former Massachusetts corporation. The statement of claim recited that, "For the loss period, the taxpayer was a Delaware corporation; for the period for which refund is claimed, the taxpayer was a Massachusetts corporation." Further, it stated: "the loss sustained by the taxpayer in the fiscal year ending November 30, 1952, gives rise to a net operating loss carryback deduction for the Massachusetts corporation for its fiscal year ending on November 30, 1951, the date of the merger." The Commissioner having failed to

act on the claim for refund for a period of more than six months from the date of its filing, the surviving Delaware corporation on September 8, 1953, filed its complaint in the court below for recovery of such refund.

We refer now to the applicable statutory provisions in the 1939 Code, as amended. They furnish no explicit guidance for the problem at hand. Section 23 (s) authorizes the deduction from gross income of "the net operating loss deduction computed under section 122." The cross-reference is to a long, complicated section, the effect of which may be summarized in three parts: *First*, § 122 (a) and (d) define "net operating loss" as, roughly, an excess of business deductions over gross income in a given taxable year. *Second*, for the years relevant here, § 122 (b) (1) (B) provides: "If for any taxable year beginning after December 31, 1949, *the taxpayer* has a net operating loss, such net operating loss shall be a net operating loss carry-back for the preceding taxable year." [Italics added.] Similarly, such net operating loss may be a carry-over for each of the five taxable years following the loss year, subject to certain adjustments. § 122 (b) (2) (B). *Third*, the "net operating loss deduction" for a given year is, roughly, the sum of the carry-backs and the carry-overs to that year. § 122 (c). In the present case we are concerned with only two taxable years and with a single carry-back; according to appellant's contention, the net operating loss which it suffered in the fiscal year ending November 30, 1952, may be carried back and applied as a deduction against the income earned by the Massachusetts corporation in the fiscal year ending November 30, 1951.

The government's answer is simple: The carry-back is available only where it is the same "taxpayer" who

has had the good year succeeded by a bad one; but here Newmarket Mfg. Co. incorporated under the laws of Massachusetts is necessarily a different legal entity from Newmarket Mfg. Co. incorporated under the laws of Delaware, and so the two are not the same "taxpayer" within the meaning of § 122 (b) (1) (B).

An issue of this sort peculiarly lends itself to logic-chopping, fine-spun distinctions, and dubious arguments by analogy. In the present opinion we shall try to keep this sort of thing to a minimum.

What may be supposed to have been the concern of the Congress, in sanctioning these departures from the general system of a strict annual accounting? There was a desire to bring stability to the tax burden of "a business with alternating profit and loss." H. R. Rep. No. 855, 76th Cong., 1st Sess. 9–10 (1939). Whose burden? That of an artificial legal entity called a corporation, or that of the human beings doing business behind the corporate facade and who, alone, actually feel the pinch of taxation? When, as here, everything in the business remains the same, except for the change of corporate domicile from Massachusetts to Delaware, the answer as an *a priori* matter seems easy: Income-tax-wise, there is no more reason why the Congress should choose to attach crucial significance to a mere change of corporate domicile than it would to a change of an individual taxpayer's domicile from Massachusetts to Delaware.

It is important also to observe in the present case that throughout the whole period in question there was only one single business—the business of manufacture and sale of woven synthetic fibers—which had a profitable year followed by several bad ones. The statutory merger does not have the result here of allowing Newmarket Mfg. Co. to obtain a carry-back privilege and a refund that would otherwise have been

unavailable, which may be the effect of a merger of several businesses, as in *Libson Shops, Inc.* v. *Koehler,* 229 F. 2d 220 (C. A. 8th, 1956), a case in which the carry-back was denied. On the contrary, but for the statutory merger the Massachusetts corporation would have been entitled to the carry-back deduction, resulting in a tax refund to it for the fiscal year ending November 30, 1951. Thus the government has to sustain the contention that the effectuation of this statutory merger, changing the corporate domicile of Newmarket Mfg. Co., defeats the carry-back deduction which would otherwise have been available. Cf. *United States* v. *Snider,* 224 F. 2d 165, 168 (C. A. 1st, 1955).

When the Congress came to enact the Internal Revenue Code of 1954, it extensively revised the provisions of law giving carry-over and carry-back privileges. Section 172 of the 1954 Code (68A Stat. 63) is the equivalent of § 122 of the 1939 Code except that the Congress—apparently deliberately—omitted the words "the taxpayer," which pointed up the difficulty in the present case under the 1939 Code. With respect to the situation of a change in corporate entity, § 381 of the 1954 Code authorizes the carry-over in certain tax-free corporate reorganizations (including, but not limited to, statutory mergers), not only of net operating losses but also of many other items (such as earnings and profits, capital losses, bond discount amortization, pension plan contributions, etc.). Section 382 bars, or limits in amount, the carry-over of a net operating loss where new owners come into the business pursuant to a reorganization. The details are not now relevant, but for present purposes it may be said in summary that, in accordance with the provisions of §§ 381 and 382, in a tax-free reorganization the net operating loss of

each component may be carried over to the survivor, subject to certain limitations, but without the necessity of showing any legal identity between the predecessor and the successor. As to the carry-back privilege, one of the "operating rules" of § 381 (b) is that, except in the case of "an acquisition in connection with a reorganization described in subparagraph (F) of section 368 (a) (1)," the surviving corporation shall not be entitled to carry back a post-reorganization net operating loss to a pre-reorganization tax year of a nonsurviving component. The cross-reference in the exception is to the statutory definition of that type of reorganization which is "a mere change in identity, form, or place of organization, however effected"—which was the type of reorganization, that occurred in the case at bar. See Mertens Law of Federal Income Taxation, Code Commentary § 381 (b): 2 (1955). Thus it is clear that if the provisions of the 1954 Code were applicable to the present case, appellant Newmarket Mfg. Co. would be entitled to the claimed refund.

We recognize that the 1954 Code should not be treated as a legislative declaration of the meaning to be ascribed to § 122 (b) (1) (B) of the 1939 Code. This is so particularly because the House committee took note of the fact that "present practice rests on court-made law which is uncertain and frequently contradictory," H. R. Rep. No. 1337, 83d Cong., 2d Sess. 41 (1954), and because the committees of both the House and Senate threw out the caution: "No inference is to be drawn from the enactment of this section whether any item or tax attribute may be utilized by a successor or a predecessor corporation under existing law." H. R. Rep. No. 1337, supra at A135 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 277 (1954). We only refer to the 1954 enactment

to point out that, when the Congress focused sharply on the problem now involved, it decided that a carry-back privilege was not to be lost in consequence of a reorganization that was no more than "a mere change in identity, form, or place of organization, however effected." This indeed is not surprising, when it is considered that taxation is an intensely practical matter, which ought to turn upon economic realities rather than upon technical differences of the corporate entity consequent upon the migration of a corporation from one state to another. We think the government's argument puts altogether too much weight upon the words "the taxpayer" in § 122 (b) (1) (B) of the 1939 Code, as amended. These words, we think, could not have been intended by the Congress to be the words of art requiring the thin distinction between Newmarket Mfg. Co. before and after its incorporation in Delaware.

The only Supreme Court cases to which we need refer are *New Colonial Ice Co., Inc.* v. *Helvering*, 292 U. S. 435 (1934), and *Helvering* v. *Metropolitan Edison Co.*, 306 U. S. 522 (1939). Neither case is precisely in point here, though the assumptions and line of reasoning of the Supreme Court in the *Metropolitan Edison* case seem to lean in the direction of the appellant's position in the case at bar.

In *New Colonial Ice Co., Inc.* v. *Helvering*, supra, the Court was concerned with the net loss carry-over provision of § 204 (b) of the Revenue Act of 1921 (42 Stat. 231). The assets and business of a corporation in some financial difficulty were taken over by a new corporation in exchange for the latter's stock, which the old corporation proceeded to distribute, share for share, to its own stockholders in order to retire the old stock. The old corporation, however, remained technically in existence, the reorganization

having been accomplished not as a statutory merger but solely on a contractual basis. It was held that the new corporation was not entitled under § 204 (b) to deduct a prereorganization net loss of the old corporation from postreorganization income of the new corporation. We pass by certain suggestions for distinguishing the case from that of a similar reorganization under the Internal Revenue Code of 1939. See *Koppers Co., Inc.* v. *United States,* 134 F. Supp. 290, 296–97 (Ct. Cl. 1955); Rapp, "Current Problems with Carry-Overs and Carry-Backs Following Corporate Reorganizations," N. Y. U. 6th Inst. on Fed. Tax. 327, 329–30 (1948). What is conclusive, we think, is that the *New Colonial* case did not involve a statutory merger.

The distinction is made clear in the subsequent case of *Helvering* v. *Metropolitan Edison Co., supra,* which did not so much as cite the *New Colonial* decision. In the *Metropolitan Edison* case, a wholly-owned subsidiary corporation had issued certain bonds at a discount. Later the parent corporation absorbed the subsidiary pursuant to the provisions of a Pennsylvania statute authorizing corporate mergers, and still later the parent retired bonds of the subsidiary which it had assumed in connection with the transaction. The Supreme Court held that the parent corporation was entitled to take a deduction for the unamortized bond discount and expense on its former subsidiary's bonds. The Court pointed to an important concession by the Commissioner:

> The petitioner concedes that if there has been a true merger or consolidation whereby the identity of the corporation issuing the bonds continues in the successor and the latter becomes liable for the debts of the former by operation of law, the successor may deduct amortization of discount and expense in re-

> spect of bonds issued by its predecessor as well as unamortized discount and expense on any of such bonds retired prior to maturity. The rule is not applicable upon a mere sale by one corporation of all its assets to another which assumes the liabilities of the former. (306 U. S. at 526–27.)

After examining the transaction in the light of the statutory provisions, the Court ruled that the transfer constituted a merger in the proper meaning of that term under the applicable Pennsylvania statute. Having pointed out that under the Pennsylvania merger statute a surviving corporation automatically becomes subject to the transferor's liability, the Court concluded:

> We are of opinion that a transfer without valuable consideration, with the intent that the transferor shall, as the statute provides, cease to exist, made in accordance with the statute, has all the elements of a merger and comes within the principle that the corporate personality of the transferor is drowned in that of the transferee. It results that the continuing corporation may deduct unamortized bond discount and expense in respect of the obligations of the transferring affiliate (306 U. S. at 529).

The Court's statement that in a true statutory merger "the corporate personality of the transferor is drowned in that of the transferee" is obviously a metaphorical expression. When one is "drowned" that is the end of him as an existing legal entity. What the Court was saying, of course, was that the transferee in a statutory merger should be deemed to be continuing in itself the corporate life of the now-defunct component, and that it followed from this conceptual identity that the two corporate entities were to be treated for a substantive purpose in the

income tax as the same taxpayer. This idea has proved acceptable to the Commissioner, in a number of contexts. See, e. g., Bureau of Internal Revenue, Pension Trust Div., P. S. No. 62, 5 CCH 1950 Stand. Fed. Tax Rep. para. 6118, and S. Rep. No. 1375, 84th Cong., 2d Sess. (1956); Rev. Rul. 54–269, 1954–2 Cum. Bull. 114; cf. *Koppers Co., Inc.* v. *United States,* 134 F. Supp. 290, 295 (Ct. Cl. 1955).

Appellant's contention that the principle of the *Metropolitan Edison* opinion should be applied to a net operating loss carry-back on the facts of the case at bar finds support in the decisions of other courts. See *Stanton Brewery, Inc.* v. *Commissioner,* 176 F. 2d 573 (C. A. 2d, 1949); *Koppers Co., Inc.* v. *United States,* 134 F. Supp. 290 (Ct. Cl. 1955); cf. *E. & J. Gallo Winery* v. *Commissioner,* 227 F. 2d 699 (C. A. 9th, 1955). But cf. *California Casket Co.,* 19 T. C. 32 (1952). We agree with appellant's contention, without intending to go beyond the facts of the case at bar. The opinions just cited have discussed the arguments on both sides in sufficient detail to make their repetition here unnecessary.

The judgment of the District Court is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

United States Court of Appeals for the First Circuit

No. 5004

NEWMARKET MANUFACTURING COMPANY,
PLAINTIFF, APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT, APPELLEE

Judgment

May 18, 1956

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

(S) ROGER A. STINCHFIELD,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE : 1956

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 216

UNITED STATES OF AMERICA, *Petitioner*

v.

NEWMARKET MANUFACTURING COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 216

UNITED STATES OF AMERICA, *Petitioner*

v.

NEWMARKET MANUFACTURING COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 49-54) is reported at 130 F. Supp. 706. The opinion of the Court of Appeals (Pet. 6-18) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1956. (Pet. 19.) The petition for a writ

of certiorari was filed on June 28, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

A business sustained a net operating loss after a mere change in corporate domicile effected through a statutory merger. The question presented is whether the loss may be carried back in computing the income tax for the year preceding the change in domicile.

STATUTES INVOLVED

The statutes involved are sections 23(s), 122(b)(1)(B), and 3797(a)(14) of the Internal Revenue Code of 1939, which are set forth in the Appendix, *infra*, pp. 18-19.

STATEMENT

The facts may be summarized as follows:

On November 7, 1944, Newmarket Manufacturing Company was organized under the laws of Massachusetts. It engaged in the business of weaving synthetic fabrics. On September 26, 1951, the respondent, bearing the same name, was chartered under the laws of Delaware in order to remove the corporate domicile to that state for a bona fide business purpose. The authorized capital stock of the respondent consisted of 450,000 shares, with a par value of $2.50 per share. Of this total, 400 shares were temporarily issued to the Massachusetts corporation for $1,000 in cash. Between September 26, 1951, and November 30, 1951, the respondent did not carry on any business or incur any liabilities. Its sole asset was the $1,000. (R. 10-11, 49.)

At the close of business on November 30, 1951, the Massachusetts corporation was merged into the respondent. On the same day Articles of Consolidation were duly filed in Massachusetts and an Agreement of Merger in Delaware. No steps were taken to dissolve the Massachusetts corporation pursuant to any provisions of Massachusetts law. The 400 temporary shares were cancelled, and the certificates in the Massachusetts corporation became certificates in the respondent. The "corporate identity, existence, purposes, powers, franchises, rights, and immunities" of the Massachusetts corporation were "merged into" and "fully vested" in the respondent. All the property of the Massachusetts corporation became the property of the respondent; and all the liabilities of the Massachusetts corporation were enforceable against the respondent "to the same extent as if" they "had been incurred or contracted by it." After the merger the respondent had the same business as the Massachusetts corporation, as well as the same officers and stockholders. Its operations continued in the same place and in the same manner. (R. 11-12, 19-49.)

Both the Massachusetts corporation and the respondent reported their income on the basis of a fiscal year ending November 30th. The respondent filed the return and paid the tax for the fiscal year ending November 30, 1951. It sustained a net operating loss of $660,370.97 in the fiscal year ending November 30, 1952. It filed a refund claim for the fiscal year 1951 on the ground that the loss was allowable as a net operating loss carry-back to that year. The claim was denied and this suit followed. The District Court rendered judgment in favor of the Government. The Court of Appeals reversed. (R. 5-8, 11-14, 49-55; Pet. 6-18.)

ARGUMENT

The decision of the Court of Appeals is correct and does not warrant review by this Court. It is not in conflict with any other appellate decision, nor does it raise an important question for this Court's special scrutiny. The disposition of the petition should not be held in abeyance until the Court decides *Libson Shops, Inc.* v. *Koehler,* No. 64, October 1956 Term.

1. The decision of the Court of Appeals rests securely on sections 23(s), 122, and 3797(a)(14) of the Internal Revenue Code of 1939. Section 23(s) allows a "net operating loss deduction computed under section 122." Section 122, in turn, prescribes various rules for the required calculation. It first defines a "net operating loss" as the excess of deductions over gross income. It then provides that if "the taxpayer" has a net operating loss, the loss is "a net operating loss carry-back" to a prior year or "a net operating loss carry-over" to a later year. The "amount of the net operating loss deduction" is "the aggregate of the net operating loss carry-overs and of the net operating loss carry-backs to the taxable year," subject to certain adjustments which are immaterial here. See *Reo Motors* v. *Commissioner,* 338 U. S. 442, 446 (1950). Finally, section 3797(a)(14) defines the term "taxpayer" as meaning "any person subject to a tax imposed by this title."[1]

This case involves a loss carry-back as specifically authorized by section 122(b)(1)(B) of the 1939 Code. Section 122(b)(1)(B) states: "If for any taxable year beginning after December 31, 1949, the taxpayer has a net operating loss, such net operating loss shall

[1] "Title" refers to the "Internal Revenue Title." Section 3797(a)(1) defines "person" as including a "corporation."

be a net operating loss carry-back for the preceding taxable year." Tax statutes, no less than other statutes, "derive vitality from the obvious purposes at which they are aimed." *Griffiths* v. *Commissioner,* 308 U. S. 355, 358 (1939). Here the animating purpose is beyond dispute. Section 122(b)(1)(B), like its related provisions, was designed to mitigate the "unduly drastic" burden borne by "a business with alternating profit and loss." See H.R. Rep. No. 855, 76th Cong., 1st Sess. 9-10 (1939); *Lewyt Corp.* v. *Commissioner,* 349 U.S. 237, 244 (1955). The losses of one year are offset against the profits of another, so that the resulting tax reflects a more "realistic, balanced picture" of the operations of the business. *Manning* v. *Seeley Tube & Box Co.,* 338 U.S. 561, 566 (1950). See further Sen. Rep. No. 1631, 77th Cong., 2d Sess. 51 (1942); *United States* v. *Olympic Radio & Television,* 349 U.S. 232, 234 (1955).

In this case the carry-back fell well within the language and policy of the statute. Obviously, the respondent sustained "a net operating loss" in "a taxable year beginning after December 31, 1949." Therefore, it treated the loss as "a net operating loss carry-back for the preceding taxable year." The Government sought to deny the carry-back on only one ground. It argued that the respondent was not "the taxpayer" in regard to the prior year in which the carry-back would apply. (Pet. 11-12.) The Court of Appeals rejected the argument as an effort to create "unwitty diversities" which "possess no relevance" here. Cf. *Helvering* v. *Hallock,* 309 U. S. 106, 118 (1940). If there had been no reincorporation, the carry-back would have been clearly allowable. The court was unable to see why a mere change in corporate domicile made a vital difference in tax result. "When,

as here," Judge Magruder wrote, "everything in the business remains the same, except for the change of corporate domicile from Massachusetts to Delaware, the answer as an *a priori* matter seems easy: Income-tax-wise, there is no more reason why the Congress should choose to attach crucial significance to a mere change of corporate domicile than it would to a change of an individual taxpayer's domicile from Massachusetts to Delaware." (Pet. 12.) In granting the carry-back to "the taxpayer," Congress did not contemplate any "thin distinction between Newmarket Mfg. Co. before and after its incorporation in Delaware." (Pet. 15.) This conclusion was amply buttressed by a cogent analysis of the relevant statutes, cases, and rulings.

The decision of the Court of Appeals is neither novel nor startling. It is the settled view of the Treasury that where a business reincorporates, the taxable entity remains the same if the corporate rights and liabilities are essentially undisturbed. The "same body" continues "with the same officers and stockholders," as well as "the same property, assets," and "business." The entity is "one and the same" before and after the change. Cf. *Metropolitan Bank* v. *Claggett,* 141 U. S. 520, 527 (1891). Since the identity of the taxpayer is not affected, only one return is required for the year in which the reincorporation occurs. G.C.M. 24423, 1945 Cum. Bull. 145; Rev. Rul. 54-269, 1954-2 Cum. Bull. 114. The Court of Appeals determined that the same principle equally applied here. As Judge Magruder succinctly put it, "taxation is an intensely practical matter, which ought to turn upon economic realities rather than upon technical differences of the corporate entity consequent upon the migration of a corporation from one state to another." (Pet. 15.)

2. The correctness of the decision below is confirmed by section 381 of the Internal Revenue Code of 1954. Section 381 provides for the transfer of various tax items or attributes from one corporation to another. It consists of three subsections. Subsection (a) states the so-called "general rule" for the section. The transfer of items is allowed if all or substantially all the property of a corporation is acquired by another corporation in one of four types of tax-free reorganization. Among them is the reorganization described in section 368(a)(1)(F) of the 1954 Code, which was formerly section 112(g)(1)(F) of the 1939 Code. This reorganization is "a mere change in identity, form, or place of organization, however effected." As Judge Magruder pointed out, this kind of change includes the simple change in corporate domicile which occurred here. (Pet. 14.)[2] Subsection (b) of section 381 sets forth "operating rules" or "conditions and limitations" which apply to the transfer of items otherwise allowed. It declares that except "in the case of an acquisition in connection with a reorganization described in" section 368(a)(1)(F), the transferee corporation "shall not be entitled to carry back a net operating loss for a taxable year ending after" the transfer "to a taxable year" of the transferor corporation. Subsection (c) of section 381 enumerates eighteen items which are transferred from one corporation to another. These items include loss carryovers, but they do not include loss carry-backs.

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[2] The Government has not disputed that the merger in this case was "a mere change" in "place of organization" within the meaning of section 112(g)(1)(F) of the 1939 Code. Cf. *George Whittell & Co.*, 34 B.T.A. 1070 (1936); Rev. Rul. 54-193, 1954-1 Cum. Bull. 106.

Section 381 is particularly revealing here. Neither subsection (a) nor subsection (c) grants a loss carry-back to a successor corporation. Yet subsection (b) provides "operating rules" which necessarily assume that the carry-back is allowable where the business has merely changed its corporate domicile. In these circumstances only one inference seems reasonable. Section 381 plainly presupposes that under prior law a loss carry-back is already available if, as in this case, there is but "a mere change" in the "place of organization." Unless the section is viewed in this light, there is no deduction to which the "operating rules" can apply in such cases. Nor is there any doubt that section 381 contemplates a loss carry-back in favor of the surviving corporation if a business is merely reincorporated elsewhere. To quote the report of the Senate Finance Committee, "assume corporation X merges into corporation Y on December 31, 1954, in a statutory merger with Y's charter continuing after the merger. If Y has a net operating loss in 1955, such loss cannot be carried back to a taxable year of X but shall be a carry-back to a taxable year of Y. If, however, corporation X, in a reorganization described in subparagraph (F) of section 368(a)(1), merely changes its identity, form, or place of organization, the resulting corporation is entitled to carry back its net operating loss to a taxable year of X prior to the reorganization." Sen. Rep. No. 1622, 83d Cong., 2d Sess. 276 (1954). Cf. H. R. Rep. No. 1337, 83d Cong., 2d Sess. A135 (1954). See further Mertens, Law of Federal Income Taxation, Code Commentary § 381(b):2 (1955).

This quotation necessarily summarizes the law of loss carry-backs in the 1939 Code, as well as in the 1954 Code, where there is a mere change of corporate

domicile. For as we have just noted, the 1954 Code does not contain any new provision which grants the carry-back in this situation. It simply picks up where the 1939 Code left off. It builds on the premise that the carry-back is already allowed and continues to allow it. In short, the carry-back allowed under the 1954 Code is equally allowed under the 1939 Code.[3]

3. The Government pretty much concedes that, apart from the decision in *Libson Shops, Inc.* v. *Koehler, supra,* it has no reason to petition for a writ of certiorari. It does not assert that the decision below creates any serious administrative difficulties, nor does it claim that it has other pending cases which are akin to this one. The sole basis for its petition is that the question in this case is allegedly "similar" to the question in the *Libson* case, and hence the decision of the First Circuit may possibly conflict with the decision of the Eighth Circuit. (Pet. 5.)[4] We respectfully submit that the Government is unduly disturbed by a similarity and a conflict which do not exist. The issues in the two cases are quite different and distinct; and the decision below does not expressly or impliedly impugn the decision of the Eighth Circuit. By the same token, there is no need for certiorari here in order to ascertain whether the *Libson* case was rightly or wrongly decided.

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[3] We are not unaware of the general statement in the committee reports that "No inference is to be drawn from the enactment" of section 381 "whether any item or tax attribute may be utilized by a successor or a predecessor corporation under existing law." H. R. Rep. No. 1337, 83d Cong., 2d Sess. A135 (1954); Sen. Rep. No. 1622, 83d Cong., 2d Sess. 277 (1954). In the case of carry-backs, however, section 381 is meaningful only as it incorporates "existing law."

[4] Cf. Pet. in *United States* v. *Koppers Co.*, No. 215, October 1956 Term, pp. 5-6.

In the *Libson* case seventeen corporations each engaged in a separate business. One of the corporations then acquired all the businesses through a merger. Later it sought to deduct prior losses of three of the businesses from later profits of the others. The Eighth Circuit disallowed the deduction. "We find nothing to suggest," the court stated, "that Congress intended that a number of individual enterprises could pool their economic ups and downs and thus level off their tax burden between them." 229 F. 2d at 228. It compared the *Libson* situation to a case of "seventeen individuals, each owning and operating a separate and distinct business, trying to pool their resources and liabilities into one ownership and thereby attempting to take credit for the loss carry-over of three of the individuals whose enterprises had not returned a profit in the years prior to the combined ownership." *Id.* at 224. Evidently the Eighth Circuit feared that if the carry-overs were allowed, corporations would obtain an "unfair advantage" over individuals. *Id.* at 224.

The *Libson* decision deviates from a familiar pattern of adjudication which extends over many years. The courts have repeatedly held that the resulting corporation in a statutory merger or consolidation is "the taxpayer" with respect to the taxes attributable to a component corporation. The resulting corporation is "the taxpayer"—or the person "subject to" the tax—because it succeeds by operation of law to the liabilities as well as the rights of the component corporation. It "is obligated and birthmarked by statute" with "all" the "primary liability" of the component. *Bowman Hotel Corp.*, 24 B.T.A. 1193, 1203 (1931). And that "primary liability" includes the component's obligation to pay income taxes.

For example, if a deficiency is asserted in regard to the taxes of a component corporation, the resulting corporation is "the taxpayer" which is entitled to file the petition. *Bowman Hotel Corp., supra; Trahern Pump Co.,* 27 B.T.A. 363 (1932); *Skaneateles Paper Co.*, 29 B.T.A. 150 (1933), *aff'd on another issue,* 71 F. 2d 584 (7th Cir. 1934); *Alaska Salmon Co.,* 39 B.T.A. 455 (1939); *Falstaff Brewing Corp.,* P-H B.T.A. Memo. Dec. ¶ 39,371 (1939); *Northern Ohio Railway Co.,* 6 T.C.M. 1230 (1947). Similarly, the resulting corporation is "the taxpayer" which may extend the period for assessing taxes attributable to a component corporation. *Phillips* v. *Lyman H. Howe Films Co.,* 33 F. 2d 891 (3d Cir. 1929); *Commissioner* v. *Oswego Falls Corp.,* 71 F. 2d 673 (2d Cir. 1934); *Skaneateles Paper Co., supra;* G.C.M. 7310, IX-1 Cum. Bull. 237 (1930). Cf. *United States* v. *Oswego Falls Corp.,* 113 F. 2d 322 (2d Cir. 1940).[5] Again, if a resulting corporation pays the income taxes deriving from a component corporation, it may deduct the outlay as "the taxpayer" from whom the taxes are due. *Adrian & James, Inc.,* 4 T. C. 708 (1945). The payment by the resulting corporation is "in discharge of

[5] These accepted holdings cannot be cast aside as involving procedural issues. Procedure is a means to an end. To say that a resulting corporation is "the taxpayer" for procedural purposes is only to say in another way that it is "the taxpayer" for substantive purposes. It is "the taxpayer" which may dispute an alleged deficiency because it is "the taxpayer" which is liable if the deficiency is sustained. In short, these holdings are rooted in the premise that the resulting corporation is, by operation of law, "liable as principal for the obligations" of the component corporation. *United States* v. *Oswego Falls Corp., supra,* at 325. As the Tax Court has stated, the statutes which fix this liability "are more than rules of procedure—they are rules of property." *Bowman Hotel Corp., supra,* at 1206.

a liability for its own income taxes," as distinguished from a payment "in discharge of a liability for such taxes of another corporation." *Id.* at 717-718. Cf. *Magruder* v. *Supplee,* 316 U. S. 394, 396 (1942). And if a resulting corporation pays interest on tax deficiencies attributable to its merged component corporation, it may deduct the payment as interest on its own indebtedness. *Koppers Coal Co.,* 6 T. C. 1209 (1946). For "in paying such indebtedness" it is "not satisfying the indebtedness of another." 6 T. C. at 1223. See further *A. D. Saenger,* 38 B.T.A. 1295 (1938). Compare further *Helvering* v. *Metropolitan Edison Co.,* 306 U. S. 522 (1939); P.S. No. 62, 5 C.C.H. Fed. Tax Rep. ¶ 6118 (1950).

In effect, the Eighth Circuit holds that the words "the taxpayer" mean something different from what they usually mean in the 1939 Code. Cf. *United States* v. *Olympic Radio & Television, supra,* at 235. However, for present purposes we need not pause to appraise the Eighth Circuit's reading of section 122. Whatever may be the correct view where various businesses and corporations are combined, no such problem is presented here. At the very least, as the Eighth Circuit itself notes, section 122 averages the alternating profits and losses of a single enterprise. And in this case, unlike the *Libson* case, only a single enterprise is involved. (Pet. 12.) The sole question is whether "the taxpayer" changed because the corporate domicile changed. The decision below is equally narrow and precise. It only holds, as the Treasury has held, that in this confined context "the taxpayer" remains the same. See p. 6, *supra.* A mere change in corporate domicile is treated like a mere change in individual domicile. A new address does not make

a new taxpayer. (Pet. 12.)[6] Indeed, Judge Magruder meticulously distinguished the *Libson* case as involving larger issues which are absent here. He carefully indicated that his opinion was not concerned with the "effect of a merger of several businesses"; and at the end he pointedly stated that his analysis did not "go beyond the facts of the case at bar." (Pet. 12-13, 18.) And so the decision below is quite removed from the problem considered and answered by the Eighth Circuit—the availability of a net operating loss deduction after a fusion of different businesses owned by different corporations.

It follows that the decision below is equally removed from the various questions which must be probed in deciding the *Libson* case. When several corporations are combined into one, the merger fuses the profits and losses of separate enterprises. As a result, a loss carry-over may offset income where it would otherwise be wasted in the absence of the merger. Moreover, a merger of separate businesses may bring together different groups of stockholders, so that the carry-over inures to the benefit of investors who were not previously interested in the business which sustained the loss.[7] The questions, however, do not end there. The pooling of profits and losses from different businesses leads inevitably into an appropriate appraisal

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[6] Therefore, this case does not raise any problem of discrimination between individual taxpayers and corporate taxpayers—the problem which troubled the Eighth Circuit in the *Libson* case. See p. 10, *supra*. Under the decision below the same rule uniformly applies where there is a mere change in domicile.

[7] Cf. *Helvering* v. *Southwest Corp.*, 315 U. S. 194, 202-203 (1942), which contrasts a mere change in place of incorporation and "a transaction which shifts the ownership of the proprietary interest in a corporation."

of section 129 of the 1939 Code. Section 129 contemplates that after a merger is completed, prior losses of a component corporation may be deducted from later profits of the surviving corporation. For it denies the deduction to the resulting corporation only where a new group of stockholders acquires "control" of the resulting corporation and "the principal purpose" of the merger "is evasion or avoidance of Federal income or excess profits tax." See H. R. Rep. No. 871, 78th Cong., 1st Sess. 24, 49 (1943); Sen. Rep. No. 627, 78th Cong., 1st Sess. 26, 58 (1943).[8] Under section 129 the deduction is not disallowed merely because new stockholders have corporate control. The deduction is frustrated only if they obtained control for the proscribed purpose of avoidance.[9]

Of course, in referring to these ramifications of the *Libson* case, we do not mean to evaluate the Eighth Circuit's opinion. We cite them only to indicate that the *Libson* decision is enmeshed in questions which are not involved here. In this case the mere change in corporate domicile did not bestow a deduction which would not have been enjoyed in the absence of the change. In fact, as Judge Magruder aptly observed, here it is the Government, not the taxpayer, which is seeking to profit by the change in domicile. (Pet.

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[8] The legislative history of section 129 specifically indicates that it is designed to cover "an acquisition which follows by operation of law in the case of a corporation resulting from a statutory merger." H. R. Rep. No. 871, 78th Cong., 1st Sess. (1943). And the regulations under section 129 expressly embrace "such transfers or other action as is necessary to bring" the losses of one corporation "into conjunction with" the income of another. Regulations 111, § 29.129-3(1); Regulations 118, § 39.129-3(b)(1).

[9] Section 129 of the 1939 Code has been re-enacted, with some changes, as section 269 of the 1954 Code. In addition, section 269 has been supplemented by section 382 of the 1954 Code.

12-13). The short of the matter is that there is no conflict of decisions because there is no similarity of issues.

4. Though the Government has petitioned for certiorari, it seems reluctant to have this case briefed and argued on the merits. It asks that "disposition" of its petition "be held in abeyance pending the Court's decision" in the *Libson* litigation. (Pet. 5.) Apparently the Government supposes that if the *Libson* case were finally resolved against the taxpayer, the decision would equally apply in this case against the respondent. Otherwise we are at a loss to understand the Government's desire for delay. And so the Government's request would in effect, if not by design, deprive the respondent of a hearing on the merits before this Court.

We respectfully urge the Court not to approve the strategy of delay to which the Government resorts. The request for delay, like the petition for certiorari, derives from the same erroneous assumption that the *Libson* case and this case involve similar questions. As we have already indicated, the two cases reflect different aspects of a many-sided statute. Arguments directed to the broad issues in the *Libson* case will hardly illuminate the narrow issue in this case.[10] Even if the cases are deemed sufficiently related to warrant certiorari here, there are also important differences which should be thoroughly argued. Needless to say, these differences will not be considered by taxpayer's counsel in the *Libson* case, for in that case there is no reason to appraise them. Indeed, even if we mistakenly agree that the cases are much closer than they

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[10] See pp. 13-14, *supra*.

are, the Government should not have its way. For if the Government is correct in its view that certiorari is appropriate, counsel for the respondent should still enjoy the usual right to be heard. Where several cases are simultaneously before the Court, the Government should not be free to pick and choose the case that it would prefer to have argued. The interests of taxpayers are no less important than the interests of the Government. If the Court concludes, despite our contentions in opposition, that this case deserves to be fully reviewed, it also deserves to be adequately argued.

We can scarcely over-emphasize the significance of arguments by counsel under our system of law. They are "an essential preliminary" of wise adjudication. While they are necessarily partisan in purpose, they are "an indispensable adjunct of the judicial process." *Rosenberg* v. *United States,* 346 U. S. 273, 309 (1953). What is generally true of litigation is particularly true of tax litigation. Tax cases are technical cases with unsuspected permutations and complications. They must be thoroughly explored if they are to be properly resolved. The Government apparently believes that in the *Libson* case this Court may embark upon a broad analysis of statutory mergers, including the narrow issue peculiar to this case. If the Government may argue this issue—as it evidently intends to do in the *Libson* case—then the respondent is equally entitled to do so. Otherwise what should be a debate will be a monologue.

We request the Court not to defer the disposition of the Government's petition. Furthermore, if the Court should decide to grant the writ, we further request that this case be briefed and argued in the customary way. This procedure will enable the Court

to decide the case after a full analysis of opposing views.

CONCLUSION

The decision of the Court of Appeals is correct; it is not in conflict with any other decisions; and the narrow issue which it resolves does not present a significant question of law for this Court to consider. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Statutes Involved

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(s) [as added by Sec. 211 (a), Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*— For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 122 [as added by Sec. 211 (b), Revenue Act of 1939, *supra,* and as amended by sec. 215 (a), Revenue Act of 1950, c. 994, 64 Stat. 906].

NET OPERATING LOSS DEDUCTION.

* * * *

(b) *Amount of Carry-Back and Carry-Over.*—

(1) *Net operating loss carry-back.*—

* * * *

(B) *Loss for Taxable Year Beginning After 1949.*— If for any taxable year beginning after December 31, 1949, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for the preceding taxable year.

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(26 U.S.C. 1952 ed., Sec. 122.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(14) *Taxpayer.* The term "taxpayer" means any person subject to a tax imposed by this title.

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(26 U.S.C. 1952 ed., Sec. 3797)